(Slip Opinion)

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BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.

In the Matter of:	)	
Amoco Oil Company Mandan, North Dakota Refinery	)	RCRA Appeal No. 92-21
Permittee	)	

[Decided November 23, 1993]

ORDER DENYING REVIEW IN PART
AND REMANDING IN PART

Before Environmental Appeals Judges Nancy B. Firestone, Ronald L. McCallum, and Edward E. Reich.

AMOCO OIL COMPANY
MANDAN, NORTH DAKOTA REFINERY

RCRA Appeal No. 92-21

ORDER DENYING REVIEW IN PART
AND REMANDING IN PART

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Syllabus

Amoco Oil Company (Amoco) has filed a petition for review of the federal portion of a permit issued by U.S. EPA Region VIII under the 1984 Hazardous and Solid Waste Amendments to the Resource Conservation and Recovery Act. The petition seeks review of a permit for Amoco's oil refinery in Mandan, North Dakota. Amoco asks that review be granted with respect to: 1) the absence of a dispute resolution clause in the final permit; 2) the Region's refusal to include a force majeure clause; 3) the Region's failure to substitute the term "working days" for "calendar days" whenever the permit requires action in less than 30 days; 4) the Region's refusal to remove permit conditions stating that areas of concern (AOCs) would receive the same level of investigation and remediation as solid waste management units (SWMUs); 5) the Region's failure to allow for the use of conditional remedies; 6) the Region's refusal to include a definition of "construction season" that would have limited Amoco's obligation to engage in construction activities during the cold winter months; 7) the Region's refusal to include a permit provision stating that the point of compliance for measuring potential groundwater contamination is located at the refinery perimeter rather than at the edge of the SWMUs; 8) the inclusion of a permit provision requiring that, at a minimum, the RCRA Facility Investigation (RFI) Workplan meet the requirements of Permit Appendix B (RFI Workplan Outline); 9) the Region's refusal to modify the draft permit to specify that the Corrective Measure Study (CMS) Plan need only be prepared after the final RFI report has been approved; 10) the inclusion of a waste minimization provision in the final permit; 11) the allegedly erroneous listing of four SWMUs and one AOC as requiring further investigation; 12) the listing of the refinery's process (or "oily") sewer as a SWMU; 13) the requirement that Amoco submit a map depicting known tanks and piping at the facility; 14) the permit's strategy for investigating hydrogeologic conditions at the facility; 15) the addition of conditions to the final permit requiring the characterization of specific water bodies in the vicinity of the refinery; 16) the requirement that groundwater wells be sampled both before and after purging; 17) the addition of a risk assessment provision to the final permit; 18) the Region's refusal to include language in the permit stating that corrective action objectives shall be based on, among other things, current and future land use at the facility; and 19) the Region's refusal to delay issuance of the corrective action portion of the permit until reforms proposed in a February 10, 1992, memorandum from Don Clay (then-EPA's Assistant Administrator for Solid Waste and Emergency Response) could be implemented.

Held: The permit is remanded and the Region is ordered to: 1) insert a dispute resolution clause consistent with the Board's decision in *In re General Electric Company*, RCRA Appeal No. 91-7 (EAB, April 13, 1993); 2) supplement its Response to Comments with a detailed explanation, supported by record evidence, indicating why conditional remedies are not appropriate, or reopen the permit proceedings to supplement the administrative record with such information; 3) modify Section III.C.1.a. of Permit Appendix B to allow sufficient flexibility to establish an alternative point of compliance for CAMUs and determine what permit changes, if any, are required in light of the regulations addressing CAMUs promulgated subsequent to permit issuance; 4) modify Permit Condition II.F.1.a. to require preparation of the CMS Plan only after the Region has completed its review of the final RFI report and determined that corrective measures are appropriate; 5) provide a properly supported finding that the waste minimization provisions in Permit Condition III.C. and Appendix E are necessary to protect human health and the environment, or remove these conditions from the permit; 6) either identify those portions of the administrative record not currently before the Board supporting the necessity of an RFI for the API separator (SWMU #23), the caustic feed tanks (SWMU #34), the caustic neutralizer (SWMU #35), tank 735 (SWMU #38), and the sour water stripper (SWMU #48), reopen the permit proceedings to supplement the administrative record with any relevant information supporting the RFI requirement for these units, or remove these units from the list of SWMUs requiring further investigation; 7) provide a rationale for mandating that Amoco study three water bodies mentioned in the Region's Response to Comments (the Missouri River, the aerobic lagoon, and the ponds); 8) modify Section III.C.8. of Permit Appendix B requiring that wells be sampled both before and after purging;

and 9) publicly notice the permit's risk assessment provisions and allow Amoco and other interested parties the opportunity to submit comments. Review is denied with regard to all other issues.

Before Environmental Appeals Judges Nancy B. Firestone, Ronald L. McCallum, and Edward E. Reich.

Opinion of the Board by Judge Reich:

I. *BACKGROUND*

Amoco Oil Company, Mandan Refinery (Amoco) filed a petition seeking review of the federal portion of a permit issued by Region VIII on March 31, 1992, under the 1984 Hazardous and Solid Waste Amendments (HSWA) to the Resources Conservation and Recovery Act of 1976 (RCRA), 42 U.S.C.A. §§6901-6992k. [1] As requested by the Environmental Appeals Board, the Region filed a response to Amoco's petition for review (Region's Response) dated September 1, 1992.

Amoco operates a petroleum refinery on the Missouri River approximately one mile north of Mandan, North Dakota. The facility processes approximately 60,000 barrels of crude oil per day and manufactures 13 different products including gasoline, diesel fuel, jet fuel, and fuel oil. The refinery stores, treats, or disposes of several hazardous wastes including API separator sludges, heat exchanger bundle cleaning sludges, slop oil emulsion solids, oily sludges, and spent caustic. The final HSWA permit identifies 45 solid waste management units (SWMUs) and four Areas of Concern (AOCs) requiring further investigation. *See* Permit Appendix A. In addition, Amoco is required, among other things, to certify annually that on-site generation of hazardous waste is minimized to the extent practicable.

Amoco raises the following nineteen arguments on appeal: 1) the absence of a dispute resolution clause in the final permit violates Amoco's right to due process; 2) the permit should contain a force majeure clause to prevent the Agency from imposing penalties when Amoco's performance is prevented or delayed by

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[1] The non-HSWA portion of the permit was issued by the State of North Dakota, an authorized State under RCRA §3006(b), 42 U.S.C. §6926(b). We note that, effective July 6, 1992, the State of North Dakota received authorization to administer the corrective provisions of HSWA in lieu of EPA. 57 Fed. Reg. 19,087 (May 4, 1992). However, this authorization does not affect the HSWA portion of the permit at issue here. *See* Memorandum of Agreement Between the State of North Dakota and the U.S. Environmental Protection Agency Region VIII, at 11.

events beyond its control; 3) the Region's failure to substitute the term "working days" for "calendar days" whenever the permit requires action in less than 30 days was arbitrary and capricious; 4) the Region's refusal to remove permit conditions stating that AOCs would receive the same level of investigation and remediation as SWMUs was arbitrary and capricious; 5) the Region arbitrarily refused to allow for the use of conditional remedies at the Amoco facility; 6) the Region's refusal to include a definition of "construction season," limiting Amoco's obligation to engage in construction activities during the cold winter months, was improper; 7) the Region erroneously refused to include a permit provision stating that the point of compliance for measuring potential groundwater contamination is located at the refinery perimeter rather than at the edge of the SWMUs; 8) the Region abused its discretion by requiring that, at a minimum, the RCRA Facility Investigation (RFI) Workplan meet the requirements of Permit Appendix B (RFI Workplan Outline); 9) the Region's refusal to modify the draft permit to specify that the Corrective Measure Study (CMS) Plan need only be prepared after the final RFI report has been approved was unreasonable; 10) the Region abused its discretion by including a waste minimization provision in the permit, and by adding two paragraphs to this provision in the final permit that were not included in the draft permit and on which Amoco was unable to comment; 11) the permit erroneously lists four SWMUs and one AOC as requiring further investigation; 12) the Region erroneously included the process or "oily" sewer on the list of SWMUs; 13) the requirement that Amoco submit maps depicting current piping at the facility is overly burdensome; 14) the permit's strategy for investigating the geology and potential cross migration pathways at the facility is unreasonable; 15) the Region arbitrarily added conditions to the final permit requiring the characterization of specific water bodies in the vicinity of the refinery; 16) the requirement that groundwater wells must be sampled both before and after purging is unreasonable; 17) the Region abused the regulatory process by adding a risk assessment provision to the final permit without giving Amoco an opportunity to submit comments; 18) the Region improperly refused to include language in the permit stating that corrective action objectives shall be based on, among other things, current and future land use; and 19) the Region should have delayed issuance of the corrective action portion of the permit until reforms proposed in a February 10, 1992, memorandum from Don Clay (then-EPA's Assistant Administrator for Solid Waste and Emergency Response) could be implemented.

II. *DISCUSSION*

Under the rules governing this proceeding, a RCRA permit ordinarily will not be reviewed unless it is based on a clearly erroneous finding of fact or

conclusion of law, or involves an important matter of policy or exercise of discretion that warrants review. *See* 40 C.F.R. §124.19; 45 Fed. Reg. 33,412 (May 19, 1980). The preamble to section 124.19 states that "this power of review should only be sparingly exercised," and that "most permit conditions should be finally determined at the Regional level * * *." *Id*. The burden of demonstrating that review is warranted is on the Petitioner. *See In re Laidlaw Environmental Services, Thermal Oxidation Corp., Inc.*, RCRA Appeal No. 92-20, at 8 (EAB, October 26, 1993). [2]

A. *Dispute Resolution Clause*

Amoco objects to permit provisions giving the Region discretion to revise unilaterally (or require Amoco to revise) certain interim submissions prepared during the course of the corrective action process without providing a mechanism by which Amoco could challenge the Region's determination. For example, Permit Condition II.D.1.d. provides that the RFI Workplan must be approved by the Region in writing. If the Region disapproves the plan, it may either "(1) notify the Permittee in writing of the RFI Workplan's deficiencies and specify a due date for submission of a revised RFI Workplan, or (2) revise the RFI Workplan and notify the Permittee of the revisions and the start date of the schedule within the approved RFI Workplan." A similar provision applies to the submission of the CMS Plan. *See* Permit Condition II.F.1.c. Upon final approval by the Region, these submissions, as modified, become an enforceable part of the permit. Amoco contends that, in order to afford it due process, the permit must contain a mechanism by which it could obtain administrative review of the Region's determination in this regard.

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[2] As a threshold matter, the Region contends that the appeal should be dismissed because it was directed to the Administrator rather than the Environmental Appeals Board as required by 40 C.F.R. §124.19(a), and was not received by the Board within 30 days of the final permit decision. *See* 40 C.F.R. §124.19(a). The Region does not dispute that the petition was received by the Administrator's Office within the 30-day time period. It is well established that, in appropriate circumstances, the Board may relax its procedural rules if the ends of justice so require. *American Farm Lines v. Blackball Freight Services*, 397 U.S. 532, 539 (1970) (Agency may relax procedural rules where justice so requires); *In re Genesee Power Station*, PSD Appeal No. 93-1, *et alia*, p. 6, n.6 (EAB, Oct. 22, 1993) (same); *In re Owen Electric Steel Company*, RCRA Appeal No. 89-37 (Adm'r, February 28, 1992) (overlooking the fact that a petition for review was filed with the Region, rather than EPA headquarters, because of the minor nature of the deficiency and the importance of the issues involved). Given the minor nature of the error and the fact that the Region suffered no prejudice, we will treat the petition as timely filed.

The Board has recently addressed this issue in *In re General Electric Company*, RCRA Appeal No. 91-7 (EAB, April 13, 1993). In that case, we held that where, as here, the permit allows the Region to revise interim submissions prepared during the corrective action process, the permit must afford the permittee a hearing on any disputed provision. [3] *Id*. at 16. Although the specific procedural safeguards required by due process may vary depending on the magnitude of the dispute, at a minimum the dispute resolution clause must: (1) afford the permittee the opportunity to submit comments to, and meet with, the regional permitting staff responsible for making any disputed revisions; (2) allow the permittee to submit written arguments and evidence to the person in the Region with the authority to make the final permit decision, i.e., the Regional Administrator or his delegatee; and (3) issue a written response to the evidence and arguments presented by the permittee. *Id*. at 17, 30; *see also In re Allied-Signal, Inc. (Frankford Plant)*, RCRA Appeal No. 90-27, at 7 (EAB, July 29, 1993). While we held that a dispute resolution provision need not, as a matter of law, be included in the permit, such a provision should be included as a matter of policy for any permit not yet final. *General Electric*, *supra*, at 29. That would include the permit under appeal in this case. Accordingly, the permit is remanded. On remand, the Region is ordered to revise the permit to include a dispute resolution clause conforming to the requirements listed above, consistent with the Board's decision in *General Electric*. [4]

B. *Force Majeure Clause*

Amoco contends that the Region erroneously denied Amoco's request for inclusion of a force majeure clause [5] in the current permit "to prevent EPA penalties from occurring when Amoco performance is prevented or delayed by events which are beyond the control of Amoco." Comments on Draft Permit, at 5 (Exh. A to Petition for Review); Petition for Review, at 2. The petition fails to convince us,

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[3] The permittee is not entitled a formal trial-type hearing, but rather an opportunity to have its objections heard by the permitting staff and the final decisionmaker. *See In re General Electric Company*, RCRA Appeal No. 91-7, at 30 (EAB, April 13, 1993).

[4] We reject the Region's argument that Amoco's challenge to the absence of a dispute resolution provision is not ripe for disposition. Region's Response, at 11. Under 40 C.F.R. §124.19(a), the Board has authority to review challenges calling for changes in existing permit language, including the addition of particular language. Because Amoco contends that the permit, as it now reads, is defective because of the absence of a dispute resolution clause, the objection is properly before the Board and appropriate for disposition. *General Electric*, *supra*, at 9-10.

[5] A "force majeure" clause would excuse Amoco from penalties for failure to meet any permit requirement if such a failure were due to causes outside its control.

however, that the Region erred in declining to include such a clause in the final permit.

If Amoco's performance is prevented or delayed by events beyond its control, it can request that the Region extend any applicable deadlines, or, if necessary, request a permit modification at that time. *See* 40 C.F.R. §270.42 (Permit modification at the request of the permittee). This appears to be the approach generally taken by the Agency in writing RCRA permits. [6] The Region has indicated that if any force majeure events occur, it is "committed to working with Amoco to resolve any dispute in a timely fashion." Response to Comments, at 1 (Exh. C to Petition for Review).

The Board recently addressed a similar issue in *In re Allied-Signal, Inc. (Frankford Plant)*, RCRA Appeal No. 90-27 (EAB, July 29, 1993). In that case, Allied-Signal objected to the Region's refusal to broaden a provision allowing petitioner to request changes to previously approved plans and schedules "[i]n the event of unforeseen circumstances beyond the control of the Permittee." Allied-Signal argued, in part, that this language was too restrictive. The Region responded that it would accept all reasonable requests to revise plans and submissions. The Board rejected Allied-Signal's concern in part because:

> [T]he Region's statement in its response to comments that it will accept all reasonable requests to revise plans and submissions merely restates what the Region is already required to do, namely, act reasonably in implementing all permit conditions. In any event, we hereby deem the Region's response to be an authoritative and binding interpretation of the permit condition at issue, thus eliminating Allied-Signal's concern.

Allied-Signal, supra, at 18. Similarly, we interpret the Region's Response here as including an implicit obligation to act reasonably on any modification request submitted based on alleged force majeure circumstances and in determining whether to seek penalties for any delay. Amoco has not cited any authority to

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[6] We note that the Model Corrective Action Permit does not contain a force majeure clause. *See* Memorandum from Joseph Carra, Director, Permits and State Programs Division, to Addressees, re: Model Permit -- Module for Corrective Action for Solid Waste Management Units (dated Nov. 30, 1988), and attached "Module XII(B), Corrective Action for Solid Waste Management Units Schedule of Compliance."

support its contention that a permit must contain an explicit force majeure clause. Accordingly, review of this issue is denied.

C. *Reporting Deadlines*

Amoco argues that the Region arbitrarily and capriciously refused to substitute the term "working days" for "calendar days" whenever the permit requires that Amoco submit some written report in less than 30 days. This would "recognize weekends and holidays," and "allow adequate time for a quality response to be prepared." Attachment to Comments on Draft Permit, at 2. Amoco states that this change should apply throughout the permit, [7] and cites Permit Condition I.D.10 (Reporting Planned Changes) as an example. That provision requires that Amoco give notice of any planned physical alterations or additions to the facility at least 14 days prior to making any such alterations or additions.

The Region states that "[t]he time frames specified in the permit are standard lengths of time used in the majority of permits and do recognize weekends and holidays. EPA has reviewed all the 30 day or less reporting requirements and found them to be standard and reasonable." Region's Response, at 14 (footnote omitted). Amoco has failed to point to any evidence in the record on appeal to suggest that it will be unable to meet any particular permit deadline. Review is therefore denied. *See In re Beazer East, Inc. and Koppers Industries, Inc.*, RCRA Appeal No. 91-25, at 8 (EAB, March 18, 1993) (Board will not address purely speculative concerns in a petition for review). [8]

D. *Areas of Concern*

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[7] *See* Attachment 1 to Comments on Draft Permit, at 2.

[8] We note that in its response, the Region has indicated that the permit must be modified to correct two errors. *See* Region's Response, at 14 n.4. First, Permit Condition I.D.14. states that Amoco must submit a written report to both EPA and the State permitting authority within five (5) calendar days of the time it becomes aware of any noncompliance with the permit that may endanger human health and the environment. Permit Appendix D, however, states that this report must be submitted within fifteen (15) days. The Region states that the correct time period is five (5) days. Second, Permit condition II.F.2.a. states that Amoco shall implement the Corrective Measure Study (CMS) according to the schedules provided in the CMS plan. Permit Appendix D, however, incorrectly states that the CMS plan must be implemented within 15 days of its approval. The Region states that the text of Condition II.F.2., is correct and that the 15-day limitation in Appendix D should be removed. *Id*. On remand, the Region must modify the permit to correct these errors.

Amoco objects to two permit conditions (I.D.20 and I.G.1.) stating that the four AOCs identified in Permit Appendix A, and any additional AOCs identified in the future, shall receive the same level of investigation and remediation as that required for SWMUs. According to Amoco, this "greatly expand[s] the scope of the SWMU definition and is, in effect, rulemaking." Petition for Review, at 3. Amoco also states:

> There is no latitude in this [AOC] definition for dealing with facilities and problems not originally considered when 1984 HSWA was enacted and for which no corrective action rules and guidance have been issued and reviewed by the regulated community.

Although not entirely clear from the petition for review, Amoco is apparently concerned that existing corrective action regulations and guidance governing SWMUs may not necessarily provide the best approach for addressing site-specific requirements at the AOCs listed in the present permit. This reading of Amoco's argument is confirmed by its comments on the draft permit, where Amoco stated that there may be instances where investigation or remediation approaches other than those directly applicable to SWMUs may be appropriate. Attachment 1 to Comments on Draft Permit, at 3.

Amoco's concerns, however, are purely speculative and thus do not warrant review. Amoco does not indicate which (if any) of the AOCs listed in Permit Appendix A might now, or in the future, require different investigation or remediation approaches than those used for SWMUs, nor does it specify what these different approaches might entail. Moreover, the corrective action process contains sufficient flexibility to address any variations that might arise between AOCs and SWMUs. If Amoco determines that any such variations are appropriate, this can be reflected in the RFI Workplan [9] and the remaining stages of the corrective action process. [10] Amoco's concerns are therefore premature. *See Beazer East, supra*. [11]

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[9] *See* Permit Condition II.D.1. (RFI Workplan(s)). We note that any disagreement on the approach proposed in the RFI Workplan would be subject to the dispute resolution provision which the Region must adopt on remand.

[10] Generally, corrective action requirements consist of several steps. The first step is usually the RCRA Facility Assessment (RFA), during which the Agency attempts to identify actual and potential releases of hazardous waste or hazardous constituents. If the RFA indicates that further investigation is required, the next step is the RCRA Facility Investigation (RFI), during which the permittee assesses the identified releases by characterizing their nature, extent, and rate of migration. The goal of the RFI

(continued...)

E. *Conditional Remedies*

Amoco argues that the Region erroneously failed to include a definition of "conditional remedy" in Permit Condition I.G. (Definitions). [12] Petition for Review, at 3. The adoption of a conditional remedy for releases at the facility would allow Amoco, where appropriate, to phase in a remedy over time. Amoco contends that such remedies are appropriate under the present circumstances, and that the permit should provide the flexibility necessary to adopt them.

The use of conditional remedies in appropriate circumstances would be authorized under the proposed Subpart S rules governing corrective action for SWMUs. [13] The preamble to the Subpart S proposal describes conditional remedies as follows:

> Generally, a conditional remedy would allow existing contamination (sometimes at existing levels) to remain within the facility boundary, provided that certain conditions are met. These conditions would include achieving media cleanup standards for any releases that have migrated beyond the facility boundary as soon as practicable, implementing source control measures that will ensure that continued releases are effectively controlled, controlling the further migration of on-site contamination, and providing financial assurance for the ultimate completion of cleanup.

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[10](...continued)
is to provide sufficient data to determine if remedial action is required. Next, if necessary, the permittee conducts a Corrective Measure Study (CMS), during which appropriate remedial measures are identified. The Region then selects the appropriate remedial measures which the permittee must implement. *See* 55 Fed. Reg. 30,801-30,802 (July 27, 1990); Office of Solid Waste and Emergency Response, *National RCRA Corrective Action Strategy*, pp. 9-15 (1986).

[11] We do not construe Amoco's petition as contending that the Agency lacks the authority to regulate AOCs. Even if such an argument had been raised, however, it would not support a grant of review in the present case. It is well settled that RCRA §3005(c)(3) provides the authority to require corrective action for non-SWMUs, provided that the Region demonstrates that such regulation is necessary to protect human health and the environment. *See Sandoz*, *supra*, at 6-7.

[12] Although the petition literally objects to the absence of a definition of "conditional remedy" in Permit Condition I.G. (Definitions), we assume that Amoco's objective is to incorporate a permit condition sanctioning the use of conditional remedies, where appropriate.

[13] Although the Subpart S proposal is not final, and thus does not have the force of law, the Agency may, where appropriate, rely on Subpart S as guidance when writing individual permits. *See Allied-Signal*, *supra*, at 14.

55 Fed. Reg. 30,833 (July 27, 1990). Citing the Subpart S proposal, Amoco argues that it is appropriate to include the concept of conditional remedies in the present permit because it would be "impractical and unrealistic to remediate to final standards in an active facility where further contamination could occur." Petition for Review, at 3.

In responding to comments on this issue, the Region merely stated that the use of conditional remedies were "not appropriate" at Amoco's facility. Response to Comments, at 2. Only in its response to Amoco's petition for review does the Region provide a rationale for denying the requested permit addition. In particular, the Region points out that the preamble to the Subpart S proposal indicates that conditional remedies would not be appropriate in at least two situations. First, conditional remedies are not appropriate where the Agency "lacks reasonable assurance that further environmental degradation will not occur." 55 Fed. Reg. 30,833. According to the Region, because Amoco intends to continue operating the refinery, further releases of pollutants are inevitable. Region's Response, at 18. Second, according to the preamble, conditional remedies may not be appropriate "where a site with ground water contamination is located in close proximity to an environmentally sensitive area." 55 Fed. Reg. 30,833. In this regard, the Region states as follows:

> [T]he Mandan refinery is adjacent to the Missouri River which is home to several endangered species, including pallid sturgeon. Studies are currently underway on other parts of the Missouri River to determine the population of these fish and the possibility of contamination from another refinery and landfill. Until the Region learns more about these fish and their sensitivity to pollutants, conditional remedies are not appropriate at the Mandan site.

Region's Response, at 18. The Region therefore argues that it properly rejected Amoco's request that the permit contain a definition of conditional remedy.

As the preamble to the Subpart S proposal makes clear, the Region may, for site-specific reasons, decline to include the concept of conditional remedies in HSWA permits where it determines that such remedies are inappropriate. The Region is entitled to broad discretion in making this judgment. 55 Fed Reg. 30,833. The reasons for the Region's determination, however, must be adequately explained and supported by sufficient evidence in the administrative record. *See* 40 C.F.R. §§124.11 & 124.17. In the present case, the Region's rationale for

declining to include a definition of conditional remedies in the final permit was articulated for the first time on appeal. In addition, the administrative record on appeal contains no factual evidence supporting the Region's rationale with regard to the possible impact on the fish population of the Missouri River. We are therefore unable to determine whether the Region gave adequate consideration to Amoco's request that the concept of conditional remedies be included in the present permit. Accordingly, on remand, to sustain its position, the Region must provide a detailed explanation supported by those portions of the administrative record not currently before us indicating why conditional remedies are not appropriate, or reopen the permit proceedings to supplement the administrative record with such information. *See In re General Electric Company*, RCRA Appeal No. 91-7, p. 34 (EAB, November 6, 1992).

F. *Construction Season*

Amoco contends that the Region arbitrarily refused to include a permit provision limiting the construction season for purposes of corrective action to a time period between May 15 and October 15. According to Amoco, such a limitation is necessary because of the difficulties and possible delays involved in undertaking construction activities in the cold winter months. Amoco also states that such a provision would save resources by avoiding the need to go through the permit modification process in the event of delays caused by bad weather. This argument fails to convince us that review is warranted.

Amoco has not presented any evidence indicating that it or other facilities have been unable to undertake *any* construction activities between October 15 and May 15. In addition, according to the Region, other petroleum refineries in Region VIII with similar weather conditions have permits without construction season definitions. Where weather has necessitated a delay in these instances, the Region (upon receipt of appropriate documentation) has granted an extension of time. Similarly, extensions of time will be granted here on a case-by-case basis for any delay or cessation of work resulting from adverse weather conditions. Region's Response, at 20. Amoco has failed to demonstrate that this approach cannot work here and thus that the failure to include a specific limitation was clearly erroneous. Review is therefore denied.

G. *Point of Compliance*

In its comments on the draft permit (pp. 4-5), Amoco objected to a requirement in Section II.C.1.a. of Permit Appendix B stating that downgradient

wells "must be located at the edge of the [SWMUs] to satisfy regulatory requirements for release detection and no migration of hazardous constituents beyond the site boundary." In particular, Amoco stated:

> This requirement is unreasonable in that many situations, investigations and corrective actions will not be limited to discrete SWMUs but will encompass broad areas of contamination. In these situations it is fruitless to place detection monitoring wells at the SWMU boundary when the SWMU is present within an area of broad contamination. Similarly, it would be fruitless to require Amoco to achieve a media cleanup standard for a constituent release from the SWMU when, in the same area of contamination, that constituent is also present in higher concentrations from non-SWMU releases.

Comments on Draft Permit, at 4-5. Thus, according to Amoco, the requirement that the points of compliance [14] be located at the edge of the SWMUs does not provide sufficient flexibility to adopt alternative approaches when addressing broad areas of contamination. *Id*. at 4. Amoco therefore suggested that the permit adopt the concept of creating corrective action management units (CAMUs) so as to provide "the flexibility to design cost effective investigations and remedial systems." Comments on Draft Permit, at 5 & Attachment 1, at 4-5. Amoco also argued that in order to provide the Region with maximum flexibility in developing remedial measures, the point of compliance should be the facility perimeter. Attachment 1 to Comments on Draft Permit, at 5.

Apparently in response to this comment, the final permit includes a definition of CAMU, [15] and thus allows the Region, where appropriate, to designate

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[14] The point of compliance refers to the location where applicable media protection standards apply and at which monitoring must be conducted. *See* 40 C.F.R. §264.95(a); 47 Fed. Reg. 32,299 (July 26, 1982).

[15] The permit defines a CAMU as follows:

> [A]n area within a facility as designated by the Regional Administrator or the Department for the purpose of implementing corrective action, which is broadly contaminated by hazardous wastes (including hazardous constituents) and which may contain discrete, engineered land-based sub-units.

(continued...)

certain areas as CAMUs. Whether or not such a designation is appropriate for any area at the facility will depend on the results of the final RFI Workplan. [16] *See* Region's Response, at 21. Although the Region declined to incorporate Amoco's proposed definition of "point of compliance," the Region stated:

> Because this is such a complex issue which does not lend itself easily to one definition, EPA believes that it is better determined on a case-by-case basis and will respond to specific proposals contained in Amoco's RFI Workplan. Generally, EPA uses the unit boundary as the point of compliance to be consistent with the definition in the National Contingency Plan.

Response to Comments, at 2. [17]

On appeal, Amoco contends that Section II.C.1.a. of Permit Appendix B, requiring that downgradient wells be located at the edge of the SWMU, is inconsistent with the flexibility needed to utilize the CAMU concept. Petition for Review, at 4. The Region has agreed that Permit Appendix B should be rewritten to include an alternative point of compliance for CAMU's. [18] *See* Region's Response, at 21. Thus, on remand, the Region must modify Permit Appendix B accordingly. Moreover, as the Agency has issued new rules addressing CAMUs since the issuance of the present permit, [19] the Region is directed to determine what permit changes (if any) are required in light of these rules, and modify the permit accordingly. *See In re GSX Services of South Carolina*, RCRA Appeal No. 89-22, at 17 (EAB, Dec. 29, 1992) (requiring the Region to reevaluate disputed permit

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[15](...continued)
Permit Condition I.G.2.

[16] We note that the Region's response to any proposals in the RFI Workplan in this regard will be subject to the dispute resolution provision to be added on remand.

[17] As the Region indicates in its response, the proposed Subpart S rules contain an extensive discussion of this issue and considered several alternatives for establishing a point of compliance for remediation of ground water. Response to Comments, at 2. These include the following: (i) throughout the groundwater; (ii) at the hazardous waste unit boundary; (iii) at the edge of the existing contamination; and (iv) at the facility boundary. 55 Fed. Reg., at 30,831. The Agency decided not to propose establishing the point of compliance at the facility perimeter because it could "allow the spread of contamination within the facility boundary, and provides a smaller margin of safety than a more stringent point of compliance." *Id.*

[18] The Region states that if any CAMUs are approved in the final RFI Workplan, the point of compliance will be "an imaginary line circumscribing the several regulated units." Region's Response, at 21 (quoting 40 C.F.R. §264.95(b)(2)).

[19] *See* 58 Fed. Reg. 8683 (Feb. 16, 1993).

conditions in light of rules promulgated subsequent to permit issuance and reopen the comment period).

H. *Appendix B Requirements*

Amoco objects to Permit Condition II.D.1.c., which states, in part, that, at a minimum, the RFI Workplan shall meet the requirements of Permit Appendix B (RCRA RFI Workplan Outline). Amoco contends that it is unfair and unnecessary to require it to comply with all Appendix B requirements. Specifically, Amoco states that if further investigation reveals that no releases have occurred at a particular SWMU, none of the additional studies required by Appendix B would be necessary. *See* Attachment 1 to Comments on Draft Permit, at 6; Petition for Review, at 4. Thus, according to Amoco, the language of the above-cited permit condition should be changed to state that the RFI Workplan shall meet the requirements of Permit Appendix B "as appropriate."

As the Region states in its response (pp. 21-22), the disputed permit condition allows for omissions or deviations from the minimum requirements of Appendix B where Amoco provides sufficient written justification. [20] This provision affords Amoco the opportunity to show why further study at a SWMU would not be "appropriate." The Region has indicated that it will review any such omissions or deviations from the requirements of Permit Appendix B and, where appropriate, incorporate them into the final RFI Workplan. Region's Response, at 22. The Region's judgment in this regard will be subject to the dispute resolution provision to be added on remand. Thus, the permit provides sufficient flexibility to allow the RFI Workplan to be tailored to the facility based on site-specific considerations. Amoco has therefore failed to convince us that review is warranted. *See Beazer*, *supra*, at 7 (holding that concerns regarding the rigidity of certain corrective action requirements were unwarranted where the permit allowed for deviations or omissions in appropriate circumstances).

I. *Corrective Measures Study Plan*

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[20] Permit Condition II.D.1.c. states, in part:

> The Permittee shall provide sufficient written justification for any omissions or deviations from the minimum requirements of Appendix B. Such omissions or deviations are subject to approval of the Regional Administrator * * *.

Amoco objects to Permit Condition II.F.1.a. dealing with the preparation of a Corrective Measure Study Plan (CMS). This provision provides as follows:

> The Permittee shall prepare and submit a CMS Plan for those units requiring a CMS within ninety (90) calendar days of notification by the Regional Administrator * * * that a CMS is required. The CMS Plan shall be developed to meet the requirements of Condition II.F.1.b.

Amoco argues that this condition should be revised to specify that the CMS plan must be prepared only after the Final RFI Report has been approved pursuant to Permit Condition II.D.3.c. Petition for Review, at 5. Permit Condition II.D.3.c. states:

> The Regional Administrator * * * will review the final RFI Report(s). The Regional Administrator * * * will notify the Permittee of the need for further investigative action and/or the need for a Corrective Measures Study * * *. [The Permittee will also be notified] if no further action is required.

According to Amoco, because the selection of corrective measures is very dependant on site-specific factors, "hasty implementation of the Corrective Measures Study can lead to costly mistakes, if corrective measures are implemented BEFORE the results of the field investigation have been reviewed and approved by EPA." Petition for Review, at 5 (emphasis in original). In its response, the Region states that although it is likely that the CMS Plan will not be required before final approval of the RFI Report:

> There are situations * * * where it is appropriate to begin preparation of the CMS plan prior to approval of the RFI report. In the interest of protection of human health and the environment, the Region strongly desires to retain this flexibility.

Region's Response, at 22. We believe the disputed permit condition should be modified to provide for review of the final RFI Report before Amoco is required to begin preparation of the CMS Plan.

Permit Condition II.D.3.c. indicates that the Region will review the final RFI Report and determine the need for further action, *if any*. Permit Condition

II.F.1.a, requires the preparation of a CMS Plan *for those units requiring a CMS*. Thus, whether or not a CMS is required depends on the results of the RFI. As noted above (*supra* note 10), the Agency has used a phased approach in imposing corrective action requirements, with each phase being informed by and following from the results of the previous investigation. The purpose of the RFI (the second phase of the corrective action process) is to assess the identified releases by characterizing their nature, extent, and rate of migration in order to determine appropriate remedial actions or to document that no action is required. *See* 55 Fed. Reg. 30,801-30,802 (July 27, 1990); *National RCRA Corrective Action Strategy*, Office of Solid Waste and Emergency Response (OSWER) (1986), pp. 9-15. As Agency guidance indicates, only upon completion of the RFI and a determination that remediation is required, must the permittee conduct a Corrective Measure Study (CMS), during which appropriate remedial measures are identified. *See National RCRA Corrective Action Strategy*, at 12 ("After the RCRA Facility Investigation is *completed* the owner/operator must identify the appropriate corrective measures and recommend them to EPA or the State.") (emphasis added); *RCRA Corrective Action Plan*, OSWER (June 1988), p. 17-18 (the identification and development of corrective measure alternatives is based on the results of the final RFI Report); *see also* 55 Fed. Reg. 30,801 (July 27, 1990) (preamble to proposed Subpart S regulations) (each stage of the corrective action process "serves as a screen, sending forward to the next step those * * * units at a facility which the Agency has found to be a potential problem * * *.").

We remand the disputed Permit Condition II.F.1.a. On remand, this provision should be modified to require preparation of the CMS plan only after the Region has completed its review of the final RFI report and determined that, given the nature of any releases and the resulting contamination, corrective measures are appropriate. [21]

J. *Waste Minimization*

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[21] Although the Region states that there are situations where it is appropriate to begin preparation of the CMS plan prior to approval of the RFI report, the Region fails to identify what such a situation might be. However, where expedited action is appropriate and where it is clear from preliminary investigations that corrective measures will be required at certain units, the Region may expedite approval of portions of the final RFI report and require the permittee to begin preparation of a corrective measures study for those units. In addition, the Region may modify the permit to add an interim measure to expedite the cleanup of any contamination which cannot await the completion of the RFI/CMS process.

Amoco argues that the waste minimization requirements in Permit Condition III.C. are beyond the scope of the existing regulations and should therefore be removed from the permit. This condition provides: "[t]he Waste Minimization program required under Section III.A. above shall address the objectives listed in Appendix E." [22] Permit Appendix E (Waste Minimization Certification) defines the elements of a waste minimization program.

In both its Response to Comments (p.4) and its response to the petition for review (p.22), the Region concedes that the waste minimization provisions of Permit Condition III.C. and Appendix E are not specifically required under existing regulations. The Region states, however, that these provisions are necessary to protect human health and the environment and are included in the permit under the omnibus provision of RCRA Section 3005(c)(3). [23] Region's Response, at 22. The Region provides no factual basis supporting these permit provisions.

Although the omnibus clause has been construed broadly, the Agency's authority under this provision is not unlimited. As this Board has previously stated, the Region "may not invoke its omnibus authority unless the record contains a properly supported finding that an exercise of that authority is necessary to protect human health or the environment." *Sandoz*, *supra*, at 7. The Region may not simply rely on a finding that a permit provision is necessary to protect human health and the environment without a factual basis in the record to support such a finding. *Id*. at 8. The record on appeal does not provide a sufficient factual basis for inclusion of the disputed provisions. Accordingly, on remand, the Region must either provide a properly supported finding that the above-mentioned waste

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[22] Permit Conditions III.A. - III.A.2. require, pursuant to RCRA §3005(h), 42 U.S.C.A. §6925(h), and 40 C.F.R. §264.73(b)(9), that the permittee submit an annual certification stating that it has a program in place to reduce the volume and toxicity of hazardous waste to the degree determined to be economically practicable, and that the proposed method of treatment, storage, or disposal is the most practicable available to the permittee which minimizes the present and future threat to human health and the environment.

[23] RCRA §3005(c)(3) provides that "[e]ach permit issued under this section shall contain such terms and conditions as the Administrator (or the State) determines necessary to protect human health and the environment." 42 U.S.C.A. §6925(c)(3). This provision has been interpreted as allowing the Agency to impose permit conditions beyond those mandated in existing regulations, where necessary to protect human health and the environment. *See In re Morton International, Inc. (Moss Point, Mississippi)*, RCRA Appeal No. 90-17, at 13 (Adm'r, Feb. 28, 1992).

minimization provisions are necessary to protect human health and the environment, or remove them from the permit. [24]

K. *SWMU Listings*

Amoco objects to the listing of certain SWMUs in Permit Appendix A to be addressed in the RFI Workplan. Specifically, Amoco appeals the listing of the following SWMUs: the API separator (#23), the caustic feed tanks (#34), the caustic neutralizer (#35), tank 735 (#38), and the sour water stripper (#48). [25] Amoco contends there are no known spills or releases from any of these units, and, according to the results of the RCRA Facility Assessment (RFA), the potential for a release is low or nonexistent. [26] Petition for Review, at 6. In its response, the Region states that these and the other SWMUs included in the permit pose potential harm to human health and the environment. Region's Response, at 23. The Region further states that Amoco may present information in the RFI workplan indicating which SWMUs do not require further investigation, and the Region will then consider removing them from the permit. *Id*.

As mentioned above, the corrective action process generally begins with an RFA conducted by the Agency. The purpose of the RFA is to gather information on SWMUs and other areas of concern to determine whether there has been, or is likely to be, a release of hazardous waste or constituents that warrants further investigation during the next step of the corrective action process, the RFI. *See In re American Cyanamid Company*, RCRA Appeal No. 89-8, at 7-8 (Adm'r, Aug.

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[24] Amoco further objected to the addition of two paragraphs in Permit Appendix E because they were not included in the draft permit. These are: 1) a provision that the information requirements of the program evaluation be included in the annual report submitted pursuant to 40 C.F.R. §264.73(b)(9); and 2) a provision requiring that Amoco make all reasonable efforts to comply with the Pollution Prevention Act of 1990. Petition for Review, at 6.

With regard to the requirement that Amoco comply with Pollution Prevention Act, the Region has agreed to modify the permit to remove this provision. Region's Response, at 22-23. Thus, on remand, the Region must modify the permit accordingly. With regard to the remaining provision, Amoco contends that the cited regulation (40 C.F.R. §264.73(b)(9)) requires an annual *certification* rather than an annual report. Because the permit's entire waste minimization provision has been remanded, however, we do not address this issue. We note, however, that the regulation cited by the Region does not mention an annual report. Thus, on remand, the Region may wish to consider modifying the language of this provision.

[25] We note that the sour water stripper is actually listed as an Area of Concern.

[26] The RFA does not address the sour water stripper but Amoco indicates that it is unaware of any releases from this equipment.

5, 1991); *RCRA Facility Assessment Guidance*, p. 1-2, (Oct. 1986) (OSWER Directive 9502.00-5). The RFI is undertaken when (and if) a potentially significant release has been identified in the RFA. *See* 52 Fed. Reg. 45,788-89 (December 1, 1987) (preamble to 1987 codification rule) (results of RFA will determine whether subsequent investigations may be necessary); *RCRA Facility Investigation (RFI) Guidance*, p. 1-6, (May 1989) (OSWER Directive 9502.00-6D) (an RFI is required "where the information collected indicates a release(s) or suspected release(s) that warrant(s) further investigation."). Thus, in order to support a permit requirement for further investigation of a particular SWMU or area of concern as part of the RFI workplan, there must be some record evidence of a likely or suspected release warranting additional study. [27] *See American Cyanamid*, RCRA Appeal No. 89-8, at 8-9 (information gathered during the RFA will be used to develop the scope of the investigatory work, if any, to be completed during the RFI).

In the present case, the RFA does not support the Region's contention that the above-mentioned SWMUs require further investigation. In fact, with regard to four of these SWMUs (the API separator, caustic feed tanks, caustic neutralizer, and tank 735), the RFA indicates that the potential for release is very low or non-existent, and recommends no further action. *Final Report, RCRA Facility Assessment, Amoco Mandan Refinery*, pp 86, 88 (July 28, 1989). Nevertheless, Permit Condition II.D.1.a. applies the permit's RFI requirements to these SWMUs. The remaining SWMU, the sour water stripper, is not discussed in the RFA, [28] and nothing in the record on appeal before the Board supports the Region's assertion that the unit poses potential harm to human health and the environment. In fact, the only document in the record before us discussing this unit is a 1985 supplement to Amoco's part B permit application. That document (at p. K-1) states that no releases of hazardous waste or hazardous constituents have been identified. Because the record on appeal is insufficient to support the Region's determination that corrective action in the form of an RFI is necessary for the sour water stripper or the SWMUs mentioned above, the Region must, on remand, either identify those portions of the record not currently before us supporting the necessity of an RFI for

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[27] We note that under the regulations governing the contents of the Part B permit application, the Region may require a facility to conduct certain sampling and analysis in order to complete an RFA and determine whether further investigation is necessary. 40 C.F.R. §270.14(d)(3).

[28] The record indicates that the sour water stripper was identified as a SWMU as early as 1985. *Amoco-Mandan 1985 SWMU submittal numbers/RFA SWMU numbers*. It is therefore unclear why the sour water stripper was not investigated along with other SWMUs and areas of concern during the RFA.

these units, reopen the permit proceedings to supplement the administrative record with any relevant information, or remove these units from the permit.

L. *Oily Sewer*

Amoco objects to the inclusion of the refinery's process or "oily" sewer on the list of units requiring further investigation in the RFI Workplan. According to Amoco, the oily sewer is not a SWMU but an "in-process" operation and is therefore not subject to regulation under the HSWA corrective action requirements. Petition for Review, at 7. However, the Administrator has held that a refinery's oily sewers are indeed SWMUs, and are therefore subject to corrective action under RCRA §3004(u). *In re Texaco Refining and Marketing, Inc.*, RCRA Appeal No. 89-12, p.4 n.4 (Adm'r, Nov. 6, 1990); *In re Shell Oil Company*, RCRA Appeal No. 88-48, pp. 4-5 (Adm'r, March 12, 1990). In *Shell Oil*, as in the present case, the oily sewer consisted of a series of underground pipes used to collect and convey wastewater and spills from various parts of the facility. In that case, the Administrator rejected the argument that Region X erroneously concluded that Shell's oily sewer was a SWMU. In particular, the Administrator stated:

> Although neither the statute nor the rules define "SWMU", on its face the term plainly includes any unit used for the management of solid waste. I agree with Region X that Shell's Oily Sewer contains solid waste. The statute defines "solid waste management" as "the systematic administration of activities which provide for the collection, source separation, storage, transportation, transfer, processing, treatment, and disposal of solid waste." 42 U.S.C.A. §6903(28). This broad definition embraces the carrying of solid waste to or among SWMUs by a sewer system. The word "unit" refers to any contiguous area of land on or in which waste is placed. *See* 47 Fed. Reg. 32,289 (July 26, 1982) (defining "waste management unit"). Because Shell's Oily Sewer meets each of the necessary elements of a SWMU, the Region properly treated it as a SWMU subject to corrective action under RCRA §3004(u).

Shell Oil, supra, at 4-5 (footnotes omitted). Similarly, in *In re Chevron USA Inc.*, RCRA Appeal No. 89-26, pp. 5-6 (Adm'r, December 31, 1990), the Administrator held that a refinery's process wastewater pipes used to collect and convey solid waste between process areas, API separators, and a wastewater treatment system, fall within the definition of a SWMU.

As we see no reason to distinguish the SWMU designation in the present case from those cases cited above, we conclude that Amoco's process sewer is a SWMU subject to corrective action under RCRA §3004(u). [29] Accordingly, review is denied on this basis.

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[29] We note that the permit's designation of the oily sewer as a SWMU is consistent with the view expressed by the Agency in the preamble to the proposed Subpart S regulations. *See* 55 Fed. Reg. 30,809 (July 27, 1990). The preamble states that given the volume of wastes they handle and their potential for leakage, "there are sound reasons for considering process collection sewers to be [SWMUs]."

M. *Description of Current Conditions*

Permit Appendix B (RFI Workplan Outline) requires, among other things, that the permittee provide background information regarding current conditions at the facility. Section II.A.4. of Appendix B requires that Amoco submit a map depicting "[a]ll known past or present product and waste tanks or current piping (above, on or underground)." According to Amoco:

> This expansive request goes far beyond SWMU investigation and is illustrative of the overreach of this permit. This information is not needed to deal in a responsive and technical manner with SWMU releases. HSWA did not contemplate investigation of production processes. We have miles of piping above, on, or underground. We cannot, not [sic] should we be required to, expend the resources needed to generate items such as this, which are irrelevant and of no benefit to a focused investigation and which provides no environmental benefit.

Petition for Review, at 7. While Amoco's argument on appeal addresses both the need for this information as well as the burden this requirement places on Amoco, the comments on the draft permit address only latter. That is, the only objection Amoco raised during the comment period was that the data request was "so comprehensive it would be impossible to complete." Attachment 1 to Comments on Draft Permit, at 8. Thus, the issue of whether or not it is possible for Amoco to supply the requested information is the only one we address on appeal. *See Sandoz, supra*, at 4 (all reasonably ascertainable arguments must be raised during the comment period to be preserved for review); 40 C.F.R. §§124.13 & 124.19(a).[30]

In its response, the Region states that the requirements is not overly burdensome, as Amoco should already have this information available. Region's Response, at 24. We agree. The disputed permit condition requires only that Amoco submit a map depicting all *known* tanks and piping. Thus, Amoco need not do any significant additional investigation. Rather, in preparing the map, Amoco need only assemble and display information which should already be available. Amoco has presented no evidence indicating that it would be unable to supply the requested information, nor does the request strike us as unreasonably broad. *See*

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[30] We note that even on appeal, Amoco does not explain why this information is "irrelevant and of no benefit to a focused investigation and * * * provides no environmental benefit."

In re General Electric Company, RCRA Appeal No. 91-7, at 28 (November 6, 1992) (upholding permit provision requiring permittee to provides information on underground pipes, tunnels, tanks, and conveyances). Review is therefore denied.

N. *Soil Samples*

Part III.A. of the RFI Workplan Outline (Permit Appendix B) requires the permittee to collect information to verify or supplement existing information on the environmental setting at the facility. Condition III.A.1.c. requires that, as part of an evaluation of the hydrogeologic conditions at the facility, Amoco provide the following information:

> A description of the local geology and potential cross migration pathways. These shall be determined by an appropriate number of borings and boring spacing. The borings shall be located so that reasonably accurate cross-sections may be constructed for each SWMU and AOC.
>
> * * *
>
> ii) Samples shall be collected from all borings at intervals equal to 10% of the total depth of the borehole and shall be collected wherever contamination is suspected.

In its comments on the draft permit, Amoco argued that the requirement that borings be taken at intervals equal to 10% of the total depth of the borehole "should be dropped." Attachment 1 to Comments on Draft Permit, at 9. Specifically, Amoco stated that its "objective in completing soil borings may be to search for underground piping or determine depth to bedrock or groundwater. The permit stipulation assumes all borings are undertaken to determine extent of soil contamination." *Id*. In its response, Region VIII clarified that this boring requirement applies only to those samples collected in order to determine the environmental setting of the facility, and not to all soil borings. Response to Comments, at 5. The Region therefore left the wording of this provision unchanged.

Even though the Region VIII's response to Amoco's comments on the draft permit with regard to this issue appears to address Amoco's concerns, Amoco has nevertheless asked the Board to grant review of this provision. In its petition for review, however, Amoco no longer argues that this provision should be dropped.

Instead, Amoco contends that the provision should be modified to allow Amoco to suggest alternative sampling intervals in the RFI Workplan when appropriate.

> We note that the Region's Response (p. 24) states:
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> If Amoco has compelling reasons to change this requirement, they should be submitted in the [RFI] Workplan, where they will be reviewed by EPA and the State and possibly approved.

We consider the Region's interpretation of the permit in this regard to be authoritative and binding on the Agency. *See In re Allied-Signal, Inc. (Frankford Plant)*, RCRA Appeal No. 90-27, at 18 (EAB, July 29, 1993) (adopting Agency interpretation of disputed permit provision as authoritative and binding). Thus, Amoco appears to have the flexibility it desires. Review of the disputed provision is therefore denied.

O. *Surface Water and Sediment Investigation*

Section III.A.3. of Permit Appendix B (RFI Workplan Outline) requires that the permittee conduct a program to characterize the surface water bodies in the vicinity of the facility. In its comments on the draft permit, Amoco stated that the permit should be modified to state that such studies would be required only if a release were suspected. Attachment 1 to Comments on Draft Permit, at 9. In its Response to Comments (pp. 4-5), the Region stated:

> If Amoco can provide information in the RFI Workplan demonstrating that certain water bodies and sediments have not been affected by SWMU or AOC releases, EPA and the State will modify this section to specify which water bodies need to be studied. At a minimum, the Missouri River, the aerobic lagoon (#24) and the ponds to the north of the Mandan City water line must be studied.

On appeal, Amoco argues that by requiring further studies of the Missouri River, the aerobic lagoon, and the ponds without showing a need for these studies, the Region has imposed costly and unnecessary new requirements in the permit. Amoco does not challenge the Region's authority to include a permit provision requiring this kind of investigation where a water body may have been affected by a release.

Although the Region has not revised the disputed permit condition in response to Amoco's comments in this regard, the Region has interpreted the permit as only requiring investigation of those water bodies affected by a release from a SWMU or AOC. Thus, the permit, as interpreted by the Region, appears to address Amoco's concerns, [31] except as to the water bodies which the Region in its Response to Comments indicates Amoco "must" study.

The disputed permit condition does not identify any specific water bodies requiring investigation, including the ones referred to in the Region's Response to Comments. As such, it is virtually identical to Task IV.A.3. of the Agency's RCRA Corrective Action Plan (Interim Final, June 1988). However, the Region has, in effect, in its Response to Comments, mandated that three specific water bodies be studied (the Missouri River, the aerobic lagoon, and the ponds). There is no evidence in the record on appeal indicating that these bodies may have been affected by a release, nor has the Region articulated a rationale for stating that these water bodies must be studied. On remand, if the Region believes that Amoco must study the above-mentioned water bodies, the Region must provide a rationale for this belief. In the case of water bodies that are not part of the facility, the rationale provided by the Region must recognize that corrective action can only be required at such a water body in accordance with the requirements of RCRA §3004(v) ("Corrective action beyond facility boundary"). [32]

Thus, we uphold the disputed permit condition, as interpreted by the Region, with the understanding that Amoco can be required to study any specific water body (including those mentioned in the Region's Response to Comments) only if the administrative record supports a finding that the water body may have been affected by a release from a SWMU or AOC.

P. *Purging Wells*

Amoco objects to Section III.C.8 of Permit Appendix B requiring that three wells be sampled both before and after purging in accordance with a specified

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[31] We adopt the Region's interpretation of the permit as binding on the Agency. *See In re Allied-Signal, Inc. (Frankford Plant)*, RCRA Appeal No. 90-27, at 18 (EAB, July 29, 1993) (adopting Agency interpretation of disputed permit provision as authoritative and binding).

[32] The Board expresses no opinion on the appropriateness of requiring the permittee to characterize these three water bodies. There may be evidence not in the record on appeal which underlies the Region's conclusions. We only conclude that the record before us does not support a mandatory obligation to study these water bodies.

procedure. According to Amoco, this requirements will "create two sets of data that may be inconsistent and useless." Petition for Review, at 8.

In its response, the Region has agreed to modify the permit requirement of sampling three wells both prior to and after purging. (All wells will still be tested after purging). Region's Response, at 25. The issue is therefore moot. On remand, the Region must modify this provision accordingly.

Q. *Risk Assessment for On-Site Exposure*

Amoco objects to Section I.F. of permit Appendix B, requiring that it perform a risk assessment as part of the RFI Workplan. [33] This provision was added to the final permit in Response to a Comment on the draft permit filed by the State of North Dakota. Amoco argues that the "last minute addition" of this requirement, without providing Amoco with an opportunity to submit comments, was "an abuse of the regulatory process." Petition for Review, at 9. In addition, Amoco contends that the risk assessment requirement is unnecessary because the permit already requires the preparation of a health and safety plan that will "provide the necessary worker protection during SWMU investigation." *Id.*

In its response, the Region contends that the regulations allow the Region to make changes to the permit based on comments received on the draft permit without reopening the comment period, and that the disputed provision was added in a manner consistent with the regulations. Region's Response, at 25-26. With regard to the substance of the provision, the Region states:

> [R]isk assessment is a relatively new requirement in the RCRA program, however, it is now considered an essential part of any corrective action order or permit issued by EPA or an authorized State. Risk assessments benefit not only human health and the environment but also can be advantageous to facilities. Risk assessments establish a systematic approach to identifying all possible receptors at a site and to characterizing those constituents which may be affected by them. With this information, the facility can focus the remediation on those populations and those constituents.

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[33] Section I.F. of Appendix B states:

> The Permittee shall perform a risk assessment to determine the extent to which human health and the environment may be affected by exposures on site. The risk assessment shall be based upon the procedures outlined in the *Human Health Evaluation Manual* (EPA/540/1-89/002 and the *Environmental Evaluation Manual* (EPA/540/1-89/001) which together make up the Risk Assessment Guidance for Superfund (RAGS). The risk assessment must also be consistent with the general approach described in the preamble to the proposed Subpart S rule (7/29/90). The Permittee shall employ a model similar to the Site-wide Exposure Pathway Conceptual Model which is attached as Table 2.

Id. at 26.

The Region is correct that the regulations contemplate the possibility that permit terms will be added or revised in response to comments on the draft permit. The determination of whether or not the comment period should be reopened in such a case is generally left to the sound discretion of the Region. *See* 40 C.F.R. §124.14; *In re GSX*, *supra*, at 19. In its Response to Comments, however, the Region must specify the reasons for such changes. 40 C.F.R. §124.17(a)(1). By so doing, the Region ensures that interested parties have an opportunity to adequately prepare a petition for review and that any changes in the draft permit are subject to effective review on the merits under 40 C.F.R. §124.19. *See In re ThermalKEM, Inc.*, RCRA Appeal Nos. 88-17 & 88-15, pp. 5-6 (Adm'r, Oct. 19, 1990).

After a careful review of the record on appeal before the Board, we conclude that the Region did not provide an adequate rationale for including a risk assessment provision in the final permit. The provision was added in response to a comment filed by the North Dakota Department of Health. *See* Memorandum to File from Curtis Erikson, Environmental Engineer, Hazardous Waste Program (Sept. 10, 1991). This comment stated:

> Appendix B, Section E [(*Community Relations Plan*)]. As the permittee is required under this section to collect data and information, it may be appropriate due to the potential hazardous constituents located at the solid waste management units to add a risk assessment requirement.

Id. at 2. In its response to this comment, the Region merely states: "EPA concurs - see new wording in Appendix B, Section I.F." *EPA Response to the State of North Dakota's Comments on the HSWA Permit for Amoco-Mandan.* This statement fails to explain adequately why a risk assessment provision is necessary at this facility. The presence and the potential for a release of hazardous constituents exists at *any* facility subject to corrective action under RCRA §3004(u). Neither the State of North Dakota nor the Region indicates why such a provision is appropriate in this case. [34] We therefore conclude that the Region has failed to

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[34] *See, e.g., In re General Motors Corporation, Delco Moraine Division, et al.*, RCRA Appeal Nos. 90-24 & 90-25, at 10 (EAB, Nov. 6, 1992) (corrective action requirements must be

(continued...)

provide the permittee or other parties with an opportunity to prepare an adequately informed challenge to the permit addition. Given the significance of the addition and the potential costs of compliance to the permittee, we conclude that reopening the record to provide for comment is appropriate. *See GSX*, *supra*, at 19. On remand, the Region must publicly notice the risk assessment provision and allow Amoco and other interested parties the opportunity to submit comments. We express no opinion on the appropriateness of the risk assessment provision in the present permit. [35]

R. *CMS Plan Outline*

Amoco seeks review of the Region's failure to include a permit provision allowing for consideration of current and future land use when proposing facility-specific objectives for corrective action at the facility. Permit Appendix C (CMS Plan Outline), Section I.B. (Establishment of Corrective Measure Objectives). [36]

In its response (p. 27), the Region interprets the disputed provision as allowing Amoco to expand the CMS to address current and future land use, and we adopt this interpretation as an authoritative reading of the permit that is binding on the Agency. *See In re General Electric Company*, RCRA Appeal No. 91-7, at 29 (EAB, November 6, 1992). Amoco's objections in this regard are therefore moot.

S. *Clay Memorandum*

Finally, Amoco appeals the Region's refusal to delay issuance of the permit for a minimum of six months to allow sufficient time for reforms of the

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[34](...continued)
tailored to site-specific conditions at the facility); *RCRA Corrective Action Plan (Interim Final)* at 1 (June 1988) (OSWER Directive 9902.3) ("Each facility has unique characteristics and circumstances affecting it that need to be incorporated into any requirements for corrective action.").

[35] We note that the Region's Response does not address Amoco's contention that the permit's Health and Safety Plan provision (Appendix B, Section I.D.) will provide the necessary protection during the corrective action process. Section I.D.2. requires that, as part of the Health and Safety Plan, the permittee must include "[t]he known hazards and an *evaluation of the risks associated with those hazards*." (Emphasis added).

[36] Section I.B. of Permit Appendix C states, in pertinent part:

> The permittee shall propose facility-specific objectives for the corrective action. These objectives shall be based on public health, environmental, and ecological criteria; information gathered during the RFI; EPA guidance; and the requirements of applicable federal and state statutes and regulations.

corrective action process recommended in a February 10, 1992 memorandum from Don R. Clay to take effect. [37] Letter Accompanying Petition for Review, at 2-3. Amoco has not characterized the Clay memorandum as a legal impediment to issuance of the present permit. Rather, Amoco contends that, as a matter of policy, the Agency should delay permit issuance. *Id*. We agree with the Region that, under the present circumstances, a delay is unwarranted.

At any given time, the potential exists that the Agency may decide to change the regulations affecting a permittee. Nevertheless, due to uncertainties inherent in the process of finalizing any proposed change, it is appropriate for the Agency to continue the practice of issuing permits under the existing regulations unless a change is clearly imminent. The truth of this proposition is borne out by the case at hand, where more than a year has passed since the reforms in the Clay memorandum were first proposed and thus it is unclear whether they will ever be adopted by the Agency. If, however, the requirements applicable to a permittee should change, the regulations contain a procedure under which permits can be modified accordingly. *See* 40 C.F.R. §270.41. Under these circumstances, we think that the Region is entitled to substantial deference in its decision to proceed with the present permit notwithstanding the possibility of future changes to the regulations. Because we find no abuse of discretion, we decline to grant review on this basis.

III. *CONCLUSION*

The permit is remanded and the Region is directed to reopen the permit proceedings for the limited purposes mentioned above. [38] Appeal of the remand decision will not be required to exhaust administrative remedies under 40 C.F.R. §124.19(f)(1)(iii). On the other issues raised by Amoco, review is denied for the reasons set forth above.

So ordered.

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[37] *See* Memorandum from Don R. Clay, Assistant Administrator, to William K. Reilly, Administrator, re: Environmental Growth Initiative (February 10, 1992). While this memorandum makes some broadly-based suggestions for modifying the Agency's RCRA program, the only particular recommendation cited by Amoco is that "petroleum contaminated media need to be handled separately from other wastes subject to corrective action." Attachment A, at 3.

[38] Although 40 C.F.R. §124.19 contemplates that additional briefing typically will be submitted upon a grant of a petition for review, a direct remand without additional submissions is appropriate where, as here, it does not appear as though further briefs on appeal would shed light on the issues addressed on remand. *See, e.g., GSX, supra,* at 20.